Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

BESEM SELIMI,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ~~EIGHTH~~ 7TH CIRCUIT

PETITION FOR WRITT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's alleged concession to a general charge of alien smuggling under section 212(a)(6)(E)(i) of the Immigration and Nationality Act ("INA"); 8 USC 1182(a)(6)(E)(i), constitutes a binding factual admission specific enough to relieve the Immigration Service of its burden to present clear, convincing and unequivocal evidence of the acts which constituted aiding and abetting, and more specifically the individuals allegedly aided and abetted.

II. Whether the Petitioner knowingly encouraged, induced, assisted, aided or abetted the illegal entry of his wife, children and cousin, as defined by INA 212(a)(6)(E)(i); 8 USC 1182(a)(6)(E)(i), despite the fact that Petitioner took no overt action whatsoever to assist in their unlawful entry.

STATEMENT OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the Seventh Circuit Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI

Besem Selimi, the Petitioner, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Seventh Circuit entered this case on December 4, 2002 and January 29, 2003, respectively.

OPINIONS BELOW

The opinion of the Board of Immigration Appeals (App. A hereto) is unreported. The opinion of the Seventh Circuit Court of Appeals on the merits (App. B hereto), which is sought hereby to be reviewed, is reported at 312 F.3d 854 (7th Cir. 2002). The order of the Seventh Circuit denying the petition for panel rehearing in such case (App. C hereto) is unreported.

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the Seventh Circuit (Appendix B) was entered on December 4, 2002. A timely petition for panel rehearing was denied on January 29, 2003 (Appendix C). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(c), in that the Seventh Circuit has decided an important question of federal law that has not been, but should be, settled by this Court.

STATUTORY PROVISIONS INVOLVED

Section 212(a)(6)(E) of the INA; 8 USC 1182(a)(6)(E) provides in pertinent part:

(E) Smugglers–

(i) In general–

> Any alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or try to enter the United States in violation of law is inadmissible...
>
> (iii) Waiver authorized–
> For provision authorizing waiver of clause (i), see subsection (d)(11).

Section 212(d)(11) of the INA; 8 USC 1182(d)(11) provides in pertinent part:

> (11) The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) of subsection (a)(6)(E) in the case of any alien lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of removal, and who is otherwise admissible to the United States as a returning resident under section 211(b) and in the case of an alien seeking admission or adjustment of status as an immediate relative or immigrant under section 203(a) (other than paragraph (4) thereof), if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

STATEMENT OF THE CASE

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA" or "Board") and the Seventh Circuit Court of Appeals finding him inadmissible under INA 212(a)(6)(E)(i); 8 USC 1182 (a)(6)(E)(i) and denying him eligibility for a waiver under INA 212(d)(11); 8 USC 1182(d)(11).

(ii) Proceedings at the Immigration and Naturalization Service

Petitioner was placed into exclusion proceedings when, on May 19, 1993, he sought reentry into the United States as a returning resident alien. Traveling with Petitioner were his wife, his three children, and his cousin. Petitioner was charged with alien smuggling under INA 212(a)(6)(E)(i); 8 USC 1182(a)(6)(E)(i), and sought a waiver under section 212(d)(11); 8 USC 1182(d)(11). The Immigration Judge ordered Petitioner excluded and denied him the waiver.

(iii) Proceedings at the Board of Immigration Appeals

Petitioner appealed to the Board detailing allegations of error in the Immigration Judge's ruling. The Service filed its response brief arguing in support of the Immigration Judge's decision. On February 14, 2001, the Board upheld the decision of the Immigration Judge and dismissed Petitioner's appeal. Petitioner filed a timely petition for review with the Seventh Circuit Court of Appeals.

(iv) Statement of Facts

On May 19, 1993, Petitioner sought re-entry into the United States as a returning resident alien. Traveling with Petitioner were his wife, his three children, and his cousin. Upon arriving at JFK airport in New York, Petitioner presented his Yugoslavian passport which contained evidence of his status as a legal permanent resident alien. Petitioner's wife and cousin presented false, photo-substituted passports.

When inspectors discovered the false passports, exclusion proceedings were commenced in New York. Petitioner was charged with "alien smuggling" under Section 212(a)(6)(E)(i) of the Immigration and Nationality Act "INA"); 8 USC 1182(a)(6)(E)(i). The charging document did not list the individual aliens allegedly smuggled, nor did it contain any statement setting forth the acts of Petitioner which allegedly constituted smuggling.

In order to obtain a change of venue to Chicago, Petitioner's counsel conceded the violation of INA 212(a)(6)(E)(i) and sought a waiver of the exclusion charge under INA 212(d)(11); 8 USC 1182(d)(11). At no time did Petitioner concede any specific facts relating to the charge; and at no time did the Immigration and Naturalization Service ("INS") present any evidence whatsoever to support the charge.

It is undisputed that Petitioner traveled to Macedonia believing that his wife had obtained legal visas to enable his wife and their three young daughters to return to the United States with him. It is undisputed that Petitioner learned his wife's documents were false upon his arrival, and that all steps to procure the false documents were taken by his wife and cousin without

his knowledge, assistance or consent. It is further undisputed that although Petitioner traveled with his wife, children and cousin, Petitioner made no representations to the inspectors regarding any of them. Simply put, Petitioner took no overt action to assist his family members enter the United States with false documents.

v. Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction was proper to the Seventh Circuit Court of Appeals pursuant to section 242 of the INA; 8 USC 1252. Venue was proper in the Seventh Circuit under the same statute in that the judicial proceedings were completed by the Immigration Judge sitting in Chicago, Illinois in the Seventh Circuit.

The jurisdiction of this Court on application for writ of certiorari is invoked under U.S. Supreme Court Rule 10(c) as set forth above. That is, the petition for certiorari will present a substantial question, for the reason that the Seventh Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the United States Supreme Court. That question is whether an alien's admission to a general, vague charge of alien smuggling that does not state the identities or relationships of the persons allegedly smuggled suffices to bar the alien respondent from discretionary relief, eligibility for which depends precisely upon the identities and relationships of the persons allegedly smuggled. The decision of the Seventh Circuit completely sidesteps the most important issue in this case, namely that the admission of alien smuggling that does not state that Petitioner smuggled any person who was not his spouse or child cannot suffice to bar him from relief available to

those who smuggled only persons who are their spouse or children. The effects of this decision are grave. It threatens thousands of aliens with removal without the ability to defend against it– without the ability to present evidence of eligibility for discretionary relief for which they are entitled to be considered under law. It will affect thousands of persons, including lawful permanent residents of the United States, such as Petitioner. It will also dramatically, negatively affect their permanent resident and U.S. citizen family members. A case of this magnitude deserves review by the Supreme Court.

REASONS FOR GRANTING THE WRIT

I. Petitioner's alleged concession to a general charge of alien smuggling under INA 212(a)(6)(E)(i) does not constitute a binding factual admission specific enough to relieve the Immigration Service of its burden to present clear, convincing and unequivocal evidence of the acts which constituted aiding and abetting, and more specifically the individuals allegedly aided and abetted.

Petitioner's attorney conceded the general charge of alien smuggling under section 212(a)(6)(E) for the sole purpose of obtaining a change of venue. R. 44. No facts were ever conceded by Petitioner with respect to that charge, and the INS never presented any evidence to establish alien smuggling. Notably, the charge did not describe who Petitioner allegedly smuggled, or what acts Petitioner engaged in which constituted smuggling. The record is devoid of any such evidence, because none exists. Petitioner's concession to a general charge does not relieve the INS of its burden of proving by clear, convincing and unequivocal

evidence that Petitioner engaged in the charged conduct.

At the exclusion hearing, it was obvious even to the Immigration Judge that Petitioner had not violated Section 212(a)(6)(E). The Immigration Judge repeatedly asked the INS to offer its evidence of alien smuggling. The INS refused, relying solely on the concession made by Petitioner's counsel to the general charge.

In order to be a binding judicial admission, a statement must be 'deliberate, clear and unequivocal' "either written or oral, made in the course of judicial proceedings." Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880). Counsel's legal conclusions are not binding judicial admissions. Glick v. White Motor Co., 458 F.2d 1287, 1291 (3rd Cir. 1972). An alien might concede a legal issue, knowing that the facts of his case will provide a strong likelihood that he will be granted relief. Reyes-Hernandez v. INS, 89 F.3d 490, 492 (7th Cir. 1996). An admission to a smuggling charge must be factual enough to exclude the possibility that the conduct admitted was wholly innocent and not a violation of the statute. U.S. v. Gomez-Orozco, 188 F.3d 422 (7th Cir. 1999).

The charging document in this case does not contain any factual assertions. Petitioner conceded no facts relating to the charge of alien smuggling. The INS presented no evidence that Petitioner engaged in the conduct as charged. In fact, even the Immigration Judge recognized that the testimony indicated that Petitioner likely did not engage in alien smuggling as charged. To relieve the INS of its burden of proof in this case is to ignore the truth - Petitioner did not violate Section 212 and the INS cannot prove otherwise.

It is further noteworthy that there was no legal benefit to Petitioner which would cause him to concede an alien smuggling charge if that concession meant he was ineligible for any relief from exclusion. The only logical explanation that does not tend to prove ineffective assistance of counsel[1] is that he only conceded "smuggling" his wife and children. In that case, he would have been eligible for the waiver under INA 212(d)(11).

II. The Court erroneously concluded that Petitioner "knowingly encouraged, induced, assisted, aided or abetted" the illegal entry of his wife, children and cousin despite the fact that Petitioner took no overt action whatsoever to assist in their unlawful entry.

In order to prove a violation of section 212 (a)(6)(E)(I), the INS must establish by clear, convincing and unequivocal evidence that Petitioner intended to smuggle each and every alien whose entry he allegedly aided. Morissette v. U.S., 342 U.S. 246, 263 n.11 (1952); Staples v. U.S., 511 U.S. 600, 614-15 (___). Petitioner's intent when he traveled to Macedonia was to bring his wife and children back with him legally. It was only

---

[1]Petitioner contends, also, that to the extent that his former counsel advised him to concede the smuggling charge and failed to withdraw said admission at hearing, this constitutes ineffective assistance of counsel sufficient to deny him due process and to further require a new hearing. He is aware that the Seventh Circuit has ruled in Stroe v. INS, 256 F.3d 498 (7th Cir. 2001), that an alien arguing ineffective assistance of counsel must comply with the procedures given by the BIA in Matter of Lozada, 19 I&N Dec. 637 (BIA 1988). Petitioner has not done so in this case, but maintains that the unique circumstances of the instant case and the disastrous outcome to the Petitioner makes this case distinguishable from Stroe.

later that Petitioner learned that his wife had taken it upon herself to obtain false documents without informing Petitioner or obtaining his assistance. It is undisputed that Petitioner took no overt action to assist his wife, children or cousin in obtaining their travel documents. It is further undisputed that Petitioner made no representations of any sort regarding his wife, children or cousin to the inspectors in New York upon arriving in the United States.

According to the BIA, and as affirmed by the Seventh Circuit, the fact that Petitioner knew the documents were false and traveled on the same plane is sufficient for a finding that he "knowingly encouraged, induced, assisted, aided or abetted" the illegal entry of his wife, children and cousin. Petitioner respectfully submits that this finding is erroneous as a matter of law.

First, Petitioner never had the requisite intent to "smuggle" his family into the United States, and no evidence has ever been presented to the contrary. Upon departing for Macedonia, Petitioner intended to bring his wife and children back legally. He had no intention at all with respect to his cousin– it was his wife who determined the cousin would travel with them. In order to be innocent of alien smuggling, the BIA would have required Petitioner to prevent his wife from traveling on false documents. The law imposes no such burden on Petitioner. The fact that he knew the documents were false, without more, does not rise to the legal definition of "knowingly encouraged, induced, assisted, aided, or abetted." Nye & Nissen v. U.S., 336 U.S. 613, 619 (1949). Some overt action of assistance is required. Id., *see also* U.S. v. He, 245 F.3d 954 (7th Cir. 2001). In this case, there was none.

Assuming for the sake of argument that Petitioner did "encourage, induce, aid or abet" his wife by not stopping her from traveling on false documents, and that he did have the intent to bring his family back with him even after he knew the documents were false, the INS cannot prove that Petitioner "aided and abetted" his cousin by inference. The Immigration Judge found that if Petitioner smuggled his wife, then he must have smuggled his cousin. The record proves otherwise, however.

While Petitioner stated that he intended to bring his immediate family to the United States because his wife was worried about their safety in Macedonia, Petitioner never formed any such intention with respect to his cousin. Petitioner was informed by his wife when he arrived in Macedonia that the cousin would be coming with them, but Petitioner did not ever intend to bring his cousin to the United States at any point in time. He went solely to retrieve his immediate family. To infer that Petitioner's intentions with respect to his cousin were identical to his intentions with respect to his immediate family belie logic and the record in this case.

Simply put, even if Petitioner were deemed to have "aided and abetted" his wife and children for purposes of a 212 violation, nothing in the record supports a finding that Petitioner aided his cousin. At worst, Petitioner encouraged, assisted, abetted or aided his spouse and three daughters, and Petitioner should be declared eligible for relief under INA 212(d)(11).

CONCLUSION

Petitioner respectfully submits that the Seventh Circuit erred in the following respects:

- Petitioner's concession to the general charge of alien smuggling without conceding any specific facts should not have operated to relieve the INS of its burden of proof.
- Petitioner did not "knowingly encourage, induce, assist, aid or abet" the illegal entry of his wife, children and cousin because Petitioner took no overt action whatsoever to assist in their unlawful entry.
- Even if Petitioner did "aid and abet" the illegal entry of his wife and children, the INS did not and cannot prove the Petitioner "aided and abetted" his cousin by inference.
- Because of the above, Petitioner is eligible for consideration of relief under INA 212(d)(11); 8 USC 1182(d)(11).

Therefore, Petitioner respectfully prays that this Court grant this petition for writ of certiorari, reverse the decisions of the Seventh Circuit Court of Appeals and the BIA, hold that the Petitioner's admission to the charge of smuggling in this case does not constitute an specific admission to smuggling a person not his spouse or child, and that Petitioner is eligible for a hearing on relief under INA 212(d)(11); 8 USC 1182(d)(11), and for all other just and proper relief.

Respectfully submitted,

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No. 01-1608
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
BESEM SELIMI,
Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

November 26, 2001, Argued
December 4, 2002, Decided

COUNSEL: For BESEM SELIMI, Petitioner: Mary L. Sfasciotti, Chicago, IL USA.

For IMMIGRATION AND NATURALIZATION SERVICE, Respondent: George P. Katsivalis, IMMIGRATION & NATURALIZATION SERVICE, Chicago, IL USA. Richard M. Evans, Susan Houser, DEPARTMENT OF JUSTICE, Washington, DC USA.
JUDGES: Before ROVNER, DIANE P. WOOD, and WILLIAMS, Circuit Judges.
OPINIONBY: ROVNER
OPINION:

ROVNER, *Circuit Judge*. Besem Selimi petitions this court to review an order of the Board of Immigration Appeals (the "Board" or "BIA") finding him excludable for alien smuggling pursuant to 8 U.S.C. § 1182(a)(6)(E)(i) and ineligible for the limited waiver of excludability set forth in 8 U.S.C. § 1182(d)(11). Finding no merit in any of the challenges that Selimi makes to the Board's order, we dismiss his petition for review.

I.

The United States admitted Selimi, a native and citizen

of the former Yugoslavia, to lawful permanent residence in this country in 1991. Selimi lives in Madison, Wisconsin, where he works as a cook and holds a partial ownership interest in a restaurant. In May of 1993, Selimi returned to the former Yugoslav Republic of Macedonia, where his wife, Ajshe, and three daughters (Reshida, Kujtesa, and Vjolka–ages four, three, and one) had continued to live following his emigration to the United States. His family members previously had been granted [*2] priority immigration status by the Immigration and Naturalization Service ("INS") but had not yet received visas permitting them to enter the United States. Nonetheless, when Selimi flew back to the United States four days later, his wife and children traveled with him under falsified (photo-substituted) passports. Suzana Kuqo, his cousin, accompanied them, also using a falsified passport. Kuqo's passport listed one of Selimi's children as her own. A.R. 64.

When Selimi, his family, and his cousin debarked from their trans-Atlantic flight at New York's Kennedy Airport, INS officials detained them for questioning and determined that Selimi's wife, children, and cousin had attempted to enter this country illegally. Selimi gave a sworn statement to an INS officer regarding his trip to Macedonia. In that statement, Selimi indicated that he had traveled to Macedonia in order to bring his family members back to the United States, and that he had paid $ 5,000 in order to obtain the falsified passports. A.R. 322.

Concluding that Selimi had attempted to smuggle undocumented aliens into the United States, the INS charged him with excludability pursuant to section 212(a)(6)(E) of the Immigration [*3] and Nationality Act, 8 U.S.C. § 1182(a)(6)(E). A.R. 392. Selimi moved for a change of venue on this charge from New York to

Chicago, which was closer to home for both Selimi and his attorney, who like Selimi lived in Madison. The INS opposed the motion on the ground that its witnesses (the inspectors who had detained Selimi and taken his sworn statement) were located in New York. A.R. 285-87. An immigration judge denied Selimi's motion, reasoning that because he had not conceded inadmissibility, the New York INS inspectors would have to testify. A.R. 284. Selimi subsequently renewed his change of venue motion, this time conceding that he had violated section 212(a)(6)(E) and was excludable on that basis. A.R. 275; *see also* A.R. 273 (cover letter). He also sought relief under, *inter alia*, section 212(d)(11) of the INA, 8 U.S.C § 1182(d)(11). *See* A.R. 275. In view of his concession, the INS withdrew its opposition to the motion (A.R. 274, *see also* A.R. 283), and the immigration judge granted his motion.

At his initial appearance in Chicago, Selimi, through his counsel, confirmed his concession that he was excludable pursuant [*4] to section 212(a)(6). A.R. 43-44. An immigration judge subsequently conducted an evidentiary hearing on Selimi's request for a waiver of excludability. A.R. 48. n1 At that hearing, Selimi offered into evidence a written statement from his wife representing that it was she rather than Selimi who had paid for the falsified passports. A.R. 194-96. Mrs. Selimi averred that she had paid $ 4,000 to Kuqo's father for her passport and visa, which also included two of their daughters. A.R. 195-96. Kuqo submitted a statement likewise averring that Mrs. Selimi had paid $ 4,000 for her passport and visa and adding that Kuqo's father had paid $ 1,000 for Kuqo's passport and visa, which included the Selimis' third daughter. A.R. 197. n2 Selimi himself took the witness stand and testified that his wife

had obtained the falsified passports through Kuqo's father "on her own." A. 56-57. Selimi acknowledged that he had been aware of his family's wish to join him in the United States and that he had traveled to Macedonia to bring his family back to the United States with him. A.R. 56, 62. Selimi explained, however, that his wife had led him to believe that she had obtained a legitimate passport and visa [*5] entitling her and their children to enter the United States and had asked him to fly to Macedonia in order to accompany them to the U.S.; she was afraid to make the trip by herself. A.R. 56, 62. Only after he arrived in Macedonia did he learn that she had obtained falsified passports and visas for herself and the children. A.R. 56, 62-63. He acceded to his wife's plan to enter the U.S. illegally because he was under "high pressure" from her not to leave her in Macedonia. A.R. 63; *see also* A.R. 59, 75. n3 "I had no other avenue but to go along with the arrangement," he testified. A.R. 75. He therefore accompanied his wife, children, and cousin on the return trip to the United States knowing that they were traveling under false documents. A.R. 63. Selimi denied that he had had anything to do with his cousin's effort to enter this country. A.R. 78. He admitted, however, that his cousin's father had procured the passports for his wife and children as well as for his cousin. A.R. 57. He also admitted that he knew that his cousin's passport falsely identified one of his own children as her child and that he had paid in part for that child's passport. A.R. 78; *see also* A.R. 203. Selimi [*6] suggested that his prior statement to the INS inspector in New York, which indicated that he rather than his wife had paid for the false documentation, was inaccurate, pointing out that the INS inspector had prepared the statement and that he had not had the benefit of an interpreter during the interview that culminated in that statement. A.R. 75-78.

----------Footnotes----------

n1 Selimi alternatively sought relief under sections 208(a) of the INA, 8 U.S.C. § 1158(a) (asylum), and 243(h), 8 U.S.C. § 1253(h)(1994) (withholding of deportation). The IJ conducted a separate evidentiary hearing on these requests (A.R. 89) and ultimately denied Selimi relief (A.R. 31, 35-41). The denial of Selimi's requests for asylum and withholding of deportation are not at issue in this appeal.

n2 According to Selimi, Kuqo's father had been unable to obtain a passport for Mrs. Selimi that included all three of her children; consequently, the third daughter was added to Kuqo's passport. A.R. 203.

n3 Aside from the continuing turmoil in nearby Bosnia-Herzegovina, security officials, according to Mrs. Selimi, had been visiting their home to search the premises and to check on Selimi's whereabouts. Ar. 57-58.

----------End Footnotes----------

[*7]

In the course of the evidentiary hearing the IJ suggested that it "could be argued" that Selimi had done nothing to aid the illegal entry of his wife, children, and cousin simply by traveling with them and that therefore he was not excludable for alien smuggling under section 212(a)(6)(E) of the INA notwithstanding his concession to that effect. A.R. 65. On several occasions, the IJ asked the INS's counsel to make a proffer of the evidence that the INS might present in order to establish Selimi's excludability. *E.g.*, A.R. 66, 72. Counsel repeatedly demurred, however, noting that Selimi had conceded the issue of his excludability. *E.g.*, A.R. 65-67, 72-73. Counsel also announced that if the IJ intended to look behind

that concession or to allow Selimi to withdraw it, the INS would seek to have the case returned to New York so that the inspectors who interviewed Selimi and his family could testify. A.R. 65-66, 70-73. The INS's counsel rejected the IJ's suggestion that the officers could testify by telephone. A.R. 66. In the end, Selimi did not seek leave to withdraw his concession of excludability.

After hearing the evidence, the IJ found Selimi statutorily ineligible for a [*8] waiver of his excludability under section 212(d)(11) of the INA. A.R. 35. The judge pointed out that eligibility for the waiver is limited to an alien who has knowingly aided, encouraged, or abetted his own spouse, parent, or child to enter the United States illegally. *Id.* Selimi, the IJ found, was involved not only with the attempted entry of his wife and children into this country, but with that of his cousin as well. *Id.*

The facts reveal that the applicant traveled to the United States not only with his wife and children but also his cousin. The applicant was well aware of the fact that his cousin's false passport listed his own child as her child. The applicant was seeking to have his child admitted to the United States with his cousin under a false passport. I find on these facts that under the statute, the applicant does not qualify for a waiver of his excludability inasmuch as he also encouraged, induced, or aided in his cousin's attempted entry.

Id.

Selimi appealed the IJ's adverse determination to the BIA, but the Board dismissed the appeal. A.R. 2. The Board rejected Selimi's threshold contention that the New York IJ had coerced him into conceding [*9] his excludability by denying his motion for a change of

venue from New York to Chicago so long as he contested his excludability. In the Board's view, it was reasonable for the IJ to think that a hearing on the question of excludability should take place at the point of Selimi's entrance into the United States, where government witnesses to his entry would be available to testify. A.R. 2-3. The Board also rejected Selimi's argument that the Chicago IJ had erred in relying on Selimi's concession of excludability and by not allowing him to withdraw that concession. The BIA noted that although the IJ had "inexplicably offered suggestions as to how the Judge thought that the applicant might have argued that he is not excludable," at no time during the evidentiary hearing had Selimi attempted to retract his concession. A.R. 3. Having conceded before the IJ that he was excludable as charged, Selimi could not turn around and argue on appeal that he was not excludable, the BIA reasoned. A.R. 3. Finally, the BIA sustained the IJ's determination that Selimi was not eligible for a section 212(d)(11) waiver of excludability. The Board noted that Selimi admitted that he had traveled to Macedonia [*10] in 1993 in response to his wife's entreaties that he bring her to the United States, that he had subsequently returned to the United States in the company of his cousin as well as his wife and children, and that he knew his cousin's falsified passport listed one of his children as her own. In view of that evidence, the Board concluded, the IJ correctly found that Selimi had attempted to assist his cousin's unlawful entry into the United States and that he was therefore ineligible for relief under section 212(d)(11). A.R. 3.

II.

On review of the BIA's order, Selimi makes four principal arguments. First, Selimi contends that as a lawful permanent resident of the United States, he

should have been placed in deportation rather than exclusion proceedings. He next contends that he was deprived of due process because the government never established by clear, convincing, and unequivocal evidence that he was excludable. He goes on to suggest that he was coerced into conceding his excludability by the INS. Finally, he contends that the Board improperly denied him a waiver of excludability.

Selimi first suggests that the INS should have placed him in deportation rather than exclusion [*11] proceedings. Prior to the Immigrant Reform and Responsibility Act of 1996, there was a long-recognized distinction between exclusion proceedings, which concerned aliens who were seeking entry into the United States, and deportation proceedings, which dealt with aliens already present in this country. *See Landon v. Plasencia*, 459 U.S. 21, 25, 103 S. Ct. 321, 325, 74 L. Ed. 2d 21 (1982). Aliens in deportation proceedings enjoyed a variety of procedural protections that those in exclusion proceedings did not. *Id.* at 25-27, 103 S. Ct. at 325-26.

The INS placed Selimi in exclusion proceedings because although he had been admitted to lawful permanent residency in the United States, he had left the country for purposes of the visit to Macedonia and was seeking to re-enter the United States when he was detained for apparent alien-smuggling. As applicable to this case, the INA defines an "entry" as

. . . any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making [*12] an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction

of the Attorney General that his departure . . . was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . . .

8 U.S.C. § 1101(a)(13) (1994).

In *Rosenberg v. Fleuti*, 374 U.S. 449, 462, 83 S. Ct. 1804, 1812, 10 L. Ed. 2d 1000 (1963), the Supreme Court concluded that an alien's "innocent, casual and brief" absence from this country did not necessarily qualify as a meaningful departure such that his return to the United States would constitute an "entry" for purposes of the statute. Selimi likens his four-day trip to Macedonia to the petitioner's brief trip across the border in *Fleuti*. However, *Fleuti* itself recognized that when a resident alien leaves the United States for a reason that is inconsistent with the policies reflected in this country's immigration laws, the "interruption of residence thereby occurring would properly be regarded as meaningful." *Id.* at 462, 83 S. Ct. at 1812.

This court's opinions in [*13] *Leal-Rodriguez v. INS*, 990 F.2d 939, 944 (7th Cir. 1993), and *Lozano-Giron v. INS*, 506 F.2d 1073, 1078-79 (7th Cir. 1974), make clear that even if a resident alien leaves the United States for an innocent reason, the purpose of his trip may nonetheless be deemed improper (and thus meaningfully interruptive of his permanent residence in this country) when before returning to the United States he forms an intent to commit an illegal act. Thus, we may accept Selimi's contention that when he left the United States for Macedonia, he believed that his wife had lawfully obtained the requisite documentation to enter this country and that he had no intent to aid or encourage his family to enter the United States illegally. Yet, upon his arrival in Macedonia, Selimi learned the

truth about the passports and visas his wife and cousin had obtained and accompanied them back to the United States knowing that they were attempting to enter the country illegally. If, as the IJ and the BIA determined, Selimi intended to encourage or facilitate their attempt in some way, then the BIA could reasonably conclude that the purpose of Selimi's trip abroad was improper even [*14] if his culpable intent was not formed until after he had already departed the United States. *Leal-Rodriguez*, 990 F.2d at 944; *Lozano-Giron*, 506 F.2d at 1078-79. Selimi's departure from the United States consequently was not "innocent." The INS correctly treated the interruption in his residence as meaningful and, upon Selimi's attempted entry into the United States with his family, properly placed him in exclusion rather than deportation proceedings.

Selimi argues that he was deprived of due process because the INS failed to prove that he was excludable under section 212(a)(6)(E) by clear, convincing, and unequivocal evidence, including in particular evidence that he acted with the requisite knowledge and intent in accompanying his wife, children, and cousin back to the United States. But Selimi relieved the INS of that burden when, through his attorney, he conceded his excludability. Concessions of this sort, often motivated by tactical and pragmatic considerations, are routinely made in immigration proceedings. *See, e.g., Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996). Selimi suggests that because his attorney [*15] simply conceded excludability generally, without admitting any facts that would establish his excludability, the INS remained obligated to prove, and the Immigration Judge was still required to find, that he was excludable. But the concession that Selimi's attorney made was in the nature of a judicial admission, and such an admission has the effect of withdrawing an issue from controversy.

See, e.g., Solon v. Gary Community School Corp., 180 F.3d 844, 858 (7th Cir. 1999). Having formally conceded that he was excludable, Selimi may not now contend that the INS's proof of excludability was insufficient. *Cf. Arreola-Arellano v. INS*, 223 F.3d 653, 656 (7th Cir. 2000) ("we need not speculate as to how the INS could have proven deportability, because [petitioner] conceded that he was deportable at his deportation hearing").

Selimi contends that the INS coerced him into making this concession, but we find no merit in this contention. Selimi points out that the INS successfully opposed his initial request to transfer the proceedings from New York to Chicago on the ground that resolution of his excludability would require the testimony of officers [*16] stationed in New York; only after Selimi conceded his excludability was his renewed transfer motion granted. He goes on to note that when the IJ in Chicago began to look behind Selimi's concession and raised the possibility that he might allow Selimi to withdraw it (*see* A.R. 72-73), the INS's counsel suggested that if this came to pass the INS would seek to have the case returned to New York in order to obtain the testimony of the inspecting agents familiar with the circumstances of Selimi's return to the United States. A.R. 65-66, 70-73. The attorney also refused to agree to have the agents testify by telephone instead. A.R. 66. In this way, Selimi argues, the INS wrested the concession of excludability from him and prevented him from withdrawing it.

This vastly overdramatizes the record, however. Given that its witnesses on the subject of Selimi's excludability were in New York, the INS had a plausible basis to argue that any hearing on that subject should take place in New York, and the IJ in New York expressly agreed with that argument when he denied Selimi's initial request for

change of venue. A.R. 284. Selimi and his attorney then made a calculated decision to concede his [*17] excludability, which paved the way for transfer of the case to Chicago, and later not to request leave from the Chicago IJ to withdraw that concession. The INS's avowed intent to ask that the case be returned to New York if Selimi withdrew his concession does not strike us as a particularly lethal threat. Even assuming that the Chicago IJ was likely to grant such a request, the record gives us no reason to believe that the prospect of litigating his excludability in New York rather than Chicago was so onerous as to render involuntary his decision not to contest his excludability.

Finally, Selimi contends that the Board improperly denied his request for a waiver of excludability pursuant to section 212(d)(11). That provision grants the Attorney General discretion to waive an alien who is excludable for alien smuggling pursuant to section 212(a)(6)(E)(i) so long as "the alien has encouraged, induced, assisted, abetted, or aided *only* . . . the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law." 8 U.S.C. § 1182(d)(11) (emphasis added). As we noted above, both the IJ and the Board concluded that [*18] Selimi was not qualified for the waiver because he had aided the attempted entry of his cousin as well as his wife and children. Selimi suggests that because his primary objective was to assist the entry of his wife and children, he should remain eligible for the waiver notwithstanding the fact that his cousin attempted to gain entry into the United States along with his immediate family. To the extent that the IJ and the Board deemed whatever incidental aid and assistance he may have provided to his cousin disqualifying, they committed legal error, in Selimi's view, by interpreting section 212(d)(11) too rigidly.

However, the plain terms of section 212(d)(11) render an alien ineligible for a waiver of excludability if he has aided someone other than his spouse, parent, son, or daughter. Indeed, the statute's use of the limiting term "only," which it reinforces with the parenthetical "and no other individual," leaves no doubt that the alien cannot have aided anyone but a parent, spouse, or child in order to be eligible for the waiver. Furthermore, the statute draws no distinction between an alien's principal and lesser objectives in helping a group of individuals to enter the country, [*19] nor does it differentiate among degrees of assistance. Here, the IJ specifically found that Selimi had encouraged and assisted his cousin's attempted entry along with that of his wife and children, and the Board sustained that finding. A.R. 3, 35. Our review of that factual finding is deferential: we will uphold the BIA's determination so long as it has the support of "'reasonable, substantial, and probative evidence on the record considered as a whole.'" *INS v. Elias-Zacarias*, 502 U.S. 478, 481, 112 S. Ct. 812, 815, 117 L. Ed. 2d 38 (1992), quoting 8 U.S.C. § 1105a(a)(4) (repealed). In view of the evidence, which reveals not only that Suzana Kuqo traveled with Selimi and his family but did so using a passport that listed one of Selimi's daughters as her own child, the Board's finding was amply justified and we are not at liberty to disturb it.

III.

For all of these reasons, we dismiss Selimi's petition for review of the Board's order.

No. 01-1608

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BESEM SELIMI,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

January 29, 2003, Decided

PRIOR HISTORY: [*1]

Petition for Review of an Order of the Board of Immigration Appeals. No. A 42 919 715.

JUDGES: Before Honorable ILANA DIAMOND ROVNER, Circuit Judge, Honorable DIANE P. WOOD, Circuit Judge, Honorable ANN CLAIRE WILLIAMS, Circuit Judge.

OPINION: ORDER

On consideration of the petition for rehearing filed by petitioner on January 21, 2003, all judges on the original panel have voted to deny the petition. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing be, and the same is hereby DENIED.

U.S Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A42 919 715 -Chicago

In re: BESIM SELIMI

Date: FEB 14, 2001

IN EXCLUSION PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT:
William E. Lasko II, Esquire

ON BEHALF OF SERVICE:
Joseph M. Young
Assistant District Counsel

EXCLUDABLE:
Sec. 212(a)(6)(E), I&N Act [8 U.S.C. § 1182(a)(6)(E)]-
Smuggling aliens

APPLICATION:
Excludability; waiver of excludability

In a January 13, 1995, decision an Immigration Judge found the applicant excludable as charged, denied his application for asylum and withholding of deportation under sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 11 58(a) and 1253(h), as well as relief under section 21 2(d)(11) of the Act, and ordered him excluded and deported from the United

States.fn1 On appeal the applicant claims that the Immigration Judge erred in ordering him excluded, and erred in denying relief under section 212(d)(1 1) of the Act. The request for oral argument is denied. 8 C.F.R. § 3.1(e) (2000). The appeal will be dismissed.

The applicant argues that an Immigration Judge coerced him into conceding that he is excludable before he would grant a requested change of venue (Applicant's Br. at 6-7). On August 11, 1993, an Immigration Judge in New York declined to change the venue of the hearing from New York to Chicago, because the applicant had not admitted that he is excludable as charged (Exh. 3; see also Exh. 2 [Service Opposition to Motion to Change Venue]). The applicant subsequently admitted that he is excludable as charged, Applicant's "Amendment to Motion to Change Venue", and the Immigration Judge therefore granted the motion. See Immigration Judge's September 20, 1993, Order. The grant or denial of a change of venue motion lies within the sound discretion of the Immigration Judge. Matter of Rivera, 19 I&N Dec. 688, 690 (BIA 1988). Where an individual contests the charges against him, it is reasonable for the Immigration Judge to hold the hearing where the applicant attempted to enter and where the government witnesses to such entry would be available to testify. Id; see also Exh. 3.

The applicant argues that the Immigration Judge improperly found him to be excludable, and erred by not allowing him to withdraw his admission of excludability (Applicant's Br. at 2-5). Yet on January 12, 1994, the applicant appeared before an Immigration Judge and conceded, through counsel, that he is excludable as charged (Tr. at 2; see also Applicant's "Amendment to Motion to Change Venue"). The Board will not consider on appeal issues which were conceded at the hearing. Once the applicant conceded that he was excludable, he cannot then contend on appeal that he is not excludable. See Matter of Montenegro, 20 I&.N Dec. 603, 604 (BIA

1992) (where alien conceded deportability at a hearing before an Immigration Judge, he did not, "and indeed could not", contest deportability on appeal to the Board); Matter of Roman, 19 I&N Dec. 855, 856 (BIA 1988); 8 C.F.R. § 3.1(d)(2)(i)(B)(2000) (Board has the power to summarily dismiss an appeal where only issue on appeal concerns finding of fact or conclusion of law that was conceded at the hearing). The applicant did not attempt to withdraw his admission at the exclusion hearing. After the applicant admitted that he is excludable as charged, the Immigration Judge inexplicably offered suggestions as to how the Judge thought that the applicant might have argued that he is not excludable (Tr. at 22, 24). The applicant made no attempt to withdraw his admissions. The Immigration Judge then reviewed the applicant's sworn statement in which he admitted that he aided his family members in unlawfully entering the United States, heard the applicant's testimony, and determined that he is excludable as charged (Tr. at 31, 38; Exh. 2 [May 20, 1993 sworn statement of applicant]). The applicant still made no attempt at any time during the exclusion hearing to retract his earlier admission of excludability.

As for relief under section 212(d)(11) of the Act, to be eligible for relief an applicant must show that the object of his smuggling attempt was the alien's spouse, parent, son, or daughter. Matter of Compean-Guevara, 21 I&N Dec. 51 (BIA 1995). Despite the applicant's contentions on appeal, Applicant's Br at 5-6, the Immigration Judge properly determined that the applicant is ineligible for this relief because while the applicant assisted his wife and children in making an unlawful entry, he also assisted his cousin in making a fraudulent entry (I.J. at 4). The applicant admitted that went to Macedonia in 1993 because he was under pressure from his wife to assist her and accompany her back to the United States illegally (Tr. at 19-20, 32-33);

see also Exh. 2 (May 20, 1993, sworn statement of applicant) (purpose of entry into the United States was to bring family here from the former Yugoslavia). The applicant traveled to the United States from Macedonia with his wife and children, but also with his cousin. Id; Tr. at 16, 21; Exh. 2. The applicant knew that his cousin's false passport listed the applicant's own child as the cousin's child. (I.J. at 4; Tr. at 21, 31; Exh. 6 [Statement of Applicant]). As the applicant assisted his cousin in making a fraudulent entry, he is barred from relief under section 212(d)(11) of the Act. Matter of Compean-Guevara, supra.

ORDER: The applicant's appeal is dismissed.
FOR THE BOARD

Footnotes

fn1 While the applicant generally charged in the Notice of Appeal that the Immigration Judge erred in denying asylum, in his brief he makes clear that he is not challenging the asylum denial Applicant's Notice of Appeal; Applicant's Br at 1.